

STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of	
	DECISION

PRELIMINARY RECITALS

Pursuant to a petition filed August 26, 2015, under Wis. Admin. Code § HA 3.03(1), to review a decision by the Wood County Human Services – Wis. Rapids in regard to Medical Assistance (MA), a hearing was held on October 13, 2015, by telephone.

The issue for determination is whether the agency correctly denied the petitioner's CLTS eligibility. Specifically, the question is whether or not the petitioner meets the program's institutional "level of care" requirement.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:



Respondent:

Department of Health Services 1 West Wilson Street, Room 651 Madison, Wisconsin 53703

By:

, CSW/SSC

Wood County Human Services – Wis. Rapids 220 Third Avenue South Suite 4 Wisconsin Rapids, WI 54495

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon Division of Hearings and Appeals

FINDINGS OF FACT

- 1. Petitioner (CARES #) is a resident of Wood County.
- 2. The petitioner is disabled, and receives SSI benefits for his disability.
- 3. The petitioner applied for CLTS eligibility in approximately June 2015. On July 21, 2015, the agency advised the petitioner that his CLTS eligibility had been denied. The petitioner timely appealed. The agency's basis for denial is that the petitioner does not satisfy the level of care eligibility criterion for the program. In making its determination, the agency assigned scores to the petitioner's functional deficits and had the Wisconsin Department of Health Services run those scores through a computerized care level "screen." The result of that computerized determination was a decision by DHS that the recipient does not have care needs at an institutional level.
- 4. The petitioner, age eight, has been diagnosed with autism, ADHD, mood disorder, and encopresis; theses diagnoses are not expected to change within the next year. He craves and eats excessive amounts of protein, gaining 80 pounds over the last year. The petitioner is currently home-schooled.
- 5. SED-related facts: The petitioner has a diagnosis of a mental health disorder listed in the *DSM-IV-R*. He currently requires and receives mental health services for emotional and/or behavioral problems. The child is regularly seen by a psychotherapist, and receives behavioral treatment for autistic children. He is not psychotic, has not attempted suicide in the last three months, and has not engaged in violence in the last three months that endangered another person's life. He does not have anorexia or bulimia. The child does not engage in substance abuse or dangerous sexual contact. He runs away at a frequency of twice monthly.

During the past year, the child has not engaged in substance abuse, dangerous sexual contact, self-cutting/biting, serious threats of violence against others, inappropriate sexual conduct, animal abuse, public masturbation, or urinating on others. He has not required inpatient psychiatric hospitalization in the past year. The petitioner *does* become upset easily, and will yell, bite, hit, and head-butt others when upset, multiple times daily. The petitioner engaged and currently engages in "dangerous behaviors," as that term is defined in Department policy for this program.

- 6. The petitioner has a "substantial social competency impairment." He began his educational career in public school. Due to his behavioral problems, he was unable to continue conform to the school schedule and was unable to continue public school attendance.
- 7. The petitioner does not meet the Hospital level of care because he does not have a severe life-threatening condition requiring daily active interventions to sustain life.
- 8. The petitioner does not meet the Nursing Home level of care because his general physical health is satisfactory, and he is not at "high risk for sudden changes in medical status." The petitioner does not currently receive IV feedings, ostomy-related cares, G-tube feedings, aspiration, dialysis, catheter use, application of dressings, treatment of decubitus ulcers or other wounds, prescribed heat treatments, or administration of medical gases.
- 9. The petitioner has an IQ of 83. Math skills, vocabulary, and speech intelligibility are age appropriate. He performs below a normal level in reading and writing (letter reversals noted).
- 10. The petitioner is able to sit, stand, walk, and transfer independently. He is independent in eating. The child requires physical assistance with bathing, dressing, grooming, and toileting.

DISCUSSION

I. INTRODUCTION

The CLTS program started on January 1, 2004, after the federal Department of Health and Human Services informed Wisconsin that federal MA funding would no longer be available for in-home autism services. The Wisconsin Department of Health and Family Services released the *Medicaid Home and Community—Based Services Waivers Manual (Manual)* to assist in administering the CLTS program. The *Manual* also covers the Community Integration 1A and 1B programs, and the Brain Injury Waiver program. *See*, https://www.dhs.wisconsin.gov/waivermanual/index.htm (viewed in November 2015). The *Manual* requires a person to meet several eligibility criteria for the CLTS program, including disability and meeting an institutional level of care. *Manual*, §2.01 – 2.02 (2010). The disability determination is made for the agency by the Wisconsin Disability Determination Bureau. If the child clears this hurdle, the second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. See 42 C.F.R. §435.225(b)(1).

The level of care criteria are found in the *Manual* at Appendix A-10 (cross-referenced from *Manual* §2.07D), which defines and describes childhood care levels. There is no dispute that the petitioner does not satisfy the Hospital, Nursing Home or ICF/DD care levels described in the *Manual*. *Id*. The ICF/DD care level is for individuals who suffer from mental retardation or a developmental disability.

II. SED ANALYSIS.

The SED level applies to a child with the following:

- 1. A diagnosis of a recognized mental illness,
- 2. The diagnosis/symptoms have been present for 6 months and the are expected to persist for at least one year,
- 3. The child requires services from at least two of five enumerated service systems, and
- 4. The child exhibits severe symptomology or dangerous behaviors of sufficient intensity that, without daily community-based intervention, s/he would be at risk for institutionalization in a psychiatric hospital.

There is agreement that the petitioner has diagnoses of a mental illness that has been present for at least six months, and is expected to be present for at least another year. There is also agreement that the child requires services from at least two of the named service systems.

The agency denied eligibility here because it believes that this child does not exhibit sufficiently severe symptomology to be at risk of psychiatric institutionalization if daily intervention is not provided. The program's treatment professionals have developed a policy list of what constitutes symptoms that would lead to institutionalization. They include psychosis, suicidality (actual attempts), engaging in violence that endanger the lives of others, and anorexia/bulimia. The petitioner does not contend that he has psychosis,

suicidality, or anorexia/bulimia, or that he engages in life-endangering violence (e.g., use of a gun/knife) against another.

Another symptom category is "dangerous behaviors." This category has four subsets: (1) High-Risk Behaviors, (2) Self-Injurious Behaviors, (3) Aggressive/Offensive Behaviors, or (4) Lack of Behavioral Controls. The High-Risk Behaviors subset consists of running away, substance abuse, or dangerous sexual contact. The petitioner provided no evidence that these behaviors are present with the exception of running away. However, the frequency of the running away episodes is not great enough to meet that standard. Self-injurious Behaviors consist of self-cutting, severe self-biting, tearing at body parts, inserting harmful objects into body orifices, or head-banging. The petitioner does not engage in these actions, with the possible exception head-banging at a frequency below that required in the standard.

Aggressive/Offensive Behavior toward Others is defined as (a) serious threats of violence, (b) sexually inappropriate behavior, (c) abuse/torture of animals, (d) hitting, biting or kicking that seriously harms others, (e) public masturbation, (f) urinating on another or smearing feces, or (g) verbal abuse. Finally, Lack of Behavioral Controls is defined as destruction of property/vandalism, or theft/burglary. The petitioner does not allege that he is currently engaging in significant property destruction or theft.

The petitioner does meet the standards in the "dangerous behavior" category of Aggressive/Offensive Behavior toward Others. He does not engage in serious threats of violence, sexually inappropriate behavior, abuse/torture of animals, public masturbation, or urinating on others/smearing feces. He does engage in hitting, biting or kicking every day of the week, and requires constant "within arm's reach" supervision. These behaviors currently occur at home and in the community. Per the Department's criteria, if the child's conduct satisfies this standard, and is coupled with a "substantial social competency impairment," the passes the level of care criteria. I conclude that the child has a substantial social competency impairment, so this child does meet the "level of care" criteria, and the CLTS Waiver eligibility was incorrectly denied.

As an aside, the policy standard for "substantial social competency impairment," as written, appears to make it impossible for a home-schooled child to meet the eligibility standard in the "dangerous behavior" category. If so, this is irrational. Standard VI-B-2-b applies to a child who currently needs in–school supports for emotional/behavioral problems as shown by a school's Individualized Educational Plan. A child who is home schooled cannot meet the test at 2-b. Standard VI-B-2-a calls for the child to have behavioral or emotional problems resulting in failure, expulsion "or an inability to conform to school or work schedule for most of the day, occurring consistently over the past six months (does not include children who are home-schooled)." This child attempted public school, and was unable to conform to the school's schedule and behavioral expectations, hence his removal and the commencement of home schooling. This child, as well as an expelled child, will necessarily be home schooled. If the child's behavior remains just as bad as what caused his removal from school, I see no rational basis for excluding a child whose parent subsequently uses home schooling as a last resort.

CONCLUSIONS OF LAW

1. The Department incorrectly denied the petitioner's CLTS Waiver eligibility for failure to meet the institutional level of care requirements.

THEREFORE, it is

ORDERED

That the petition is remanded to the agency with instructions to continue, within 10 days of the date of this Decision, the processing of the petitioner's CLTS application in accord with the Conclusion of Law above.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received** within 20 days after the date of this decision. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison, Wisconsin, this 13th day of November, 2015

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals

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State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 13, 2015.

Wood County Human Services - WI Rapids Bureau of Long-Term Support